Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-545

MILTON M. MOORE, JR., PETITIONER,

versus

THE SUPREME COURT OF SOUTH CAROLINA; CHIEF JUSTICE J. WOODROW LEWIS, ASSOCIATE JUSTICE C. BRUCE LITTLEJOHN, ASSOCIATE JUSTICE JULIUS B. NESS, ASSOCIATE JUSTICE WILLIAM L. RHODES, JR., AND ASSOCIATE JUSTICE GEORGE T. GREGORY, JR., AS JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA, AND FRANCES H. SMITH, AS CLERK OF THE SUPREME COURT OF SOUTH CAROLINA AND IN HER OFFICIAL CAPACITY AS SECRETARY TO THE STATE BOARD OF LAW EXAMINERS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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MILTON M. MOORE, JR., PETITIONER,

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THE SUPREME COURT OF SOUTH CAROLINA; CHIEF JUSTICE J. WOODROW LEWIS, ASSOCIATE JUSTICE C. BRUCE LITTLEJOHN, ASSOCIATE JUSTICE JULIUS B. NESS, ASSOCIATE JUSTICE WILLIAM L. RHODES, JR., AND ASSOCIATE JUSTICE GEORGE T. GREGORY, JR., AS JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA, AND FRANCES H. SMITH, AS CLERK OF THE SUPREME COURT OF SOUTH CAROLINA AND IN HER OFFICIAL CAPACITY AS SECRETARY TO THE STATE BOARD OF LAW EXAMINERS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is appended hereto at 1a, Appendix A. The opinion of the United States District Court for the District of South Carolina is unreported and is appended hereto at 3a, Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was filed on May 1, 1978. By order of Mr. Justice Brennan, acting in the absence of the Chief Justice, the time for petitioning for a writ of certiorari to review the judgment below was extended to and including September 29, 1978. This Court has jurisdiction to review the judgment below under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether South Carolina violates due process of law, when it establishes a conclusive presumption that graduates of certain law schools are not qualified to practice law, and when it refuses to allow such a graduate to demonstrate his proficiency in law by taking a bar examination (even though he has actively practiced for eight years as a member of the bar of a neighboring state).

2. Whether a practicing attorney's right to equal protection of the laws has been violated by South Carolina's rule that permanently precludes that attorney from taking the bar examination or practicing law if he chooses to travel to South Carolina to reside.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

United States Constitution, Article IV, Section 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Amendment Fourteen:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Rule 5(4), Rules for the Examination and Admission of Persons to Practice Law in South Carolina:

> No person shall be admitted to the practice of law in South Carolina unless he . . . (4) is a graduate either of the Law School of the University of South Carolina, a law school approved by the Council of Legal Education of the American Bar Association or such other Law School as may be approved by the Supreme Court.

STATEMENT OF THE CASE

Petitioner is a member of the Georgia Bar and other bars and has been in active practice in Georgia for eight years following his admission to practice there. Yet, because he graduated from John Marshall Law School in Atlanta, a law school not approved by a private organization, the American Bar Association, the South Carolina Supreme Court will not allow him to take the South Carolina Bar Exam to demonstrate his proficiency in legal knowledge and analysis.

Petitioner brought this action in the federal district court pursuant to 42 U. S. C. § 1983, founding jurisdiction

on 28 U. S. C. § 1331.* In this action, he challenged, as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the provision of the "Rules for the Examination and Admission of Persons to Practice Law in South Carolina," as applied to him.** The district court granted respondents' motion for summary judgment. On appeal, the court of appeals affirmed on the opinion of the district court.

Petitioner argued below that the Rule at issue violated Due Process of Law because it created a conclusive, irrebuttable presumption that he did not have the legal knowledge necessary to practice law in South Carolina, although he had been admitted to the practice of law in Georgia in 1969, and had been engaged in the active practice of his profession since that time. Petitioner argued that such a presumption was particularly inappropriate since he had been admitted to the bar of this Court since 1972, and he was also a member of the bar of the United States District Court for the Northern District of Georgia, the United States District Court for the District of South Carolina, and the United States Courts of Appeals for the Fourth Circuit and for the Fifth Circuit. Petitioner further argued that the Rule, as applied to an active practitioner, violated his constitutional right to travel by placing a severe penalty on his exercise of his right to migrate from Georgia to South Carolina: the permanent exclusion of petitioner from the practice of the profession to which he has devoted his entire adult life. Petitioner sought only to be allowed a chance to prove his legal proficiency by taking an examination—and

* Jurisdiction was also proper under 28 U. S. C. §§ 1343(3) and 1343(4).

** To petitioner's knowledge, no other law school has ever been approved by the Supreme Court of South Carolina, and the respondents offered no evidence of any other schools ever having been approved or even investigated by the Supreme Court. The district court decided the matter below on the understanding that only graduates of law schools approved by the ABA could take the South Carolina bar examination. 3a.

argued that it was wholly irrational for the State of South Carolina not to give a person with eight years of active practice in a profession such a change.

The district court recognized that the Rule, as applied, created an irrebuttable presumption that petitioner does not possess the legal competence necessary to qualify for the practice of law. 11a. However, because the district court held that no penalty was imposed on the right to travel (because South Carolina residents who were not graduates of ABA approved schools could not take the examination), that court held that the Rule should be sustained if there were any "rational basis" for the rule. 6a. The State never presented any evidence or argument before the district court concerning the basis for the rule, and the *sole* basis identified by the district court for such a rule was stated thus, 5a:

> "By imposing this requirement the Supreme Court was clearly seeking assurance that the applicants received some kind of formal legal education with a broader scope than mere preparation for the bar exam. The Supreme Court obviously saw the value of lectures by legal scholars, classroom discussions, the teaching of research skills, and student oral arguments—all facets of a legal education which are not tested by the bar exam."

The district court offered no analysis of why these considerations were applicable to all law schools not approved by the ABA, to petitioner's law school, or to petitioner.* The

* The standards set forth in Approval of Law Schools: American Bar Association Standards and Rules of Procedure (1977), and its predecessors, are quite comprehensive, and impose stringent requirements as to pre-law education, number of full-time faculty, salaries of faculty, full-time librarian and extensive library facilities, size of physical plant (*e.g.*, private offices for each full-time faculty member), relation of law school to university administration, and many others. The only standard not met by petitioner's school, as far as the record reflects, was library facilities.

court of appeals affirmed on the opinion of the district court.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the judgment below approves an irrebuttable presumption indistinguishable from the presumptions condemned by this Court in *Cleveland Board of Education v. La Fleur,* 414 U. S. 632 (1974); *Vlandis v. Kline,* 412 U. S. 441 (1973); *United States Department of Agriculture v. Murry,* 413 U. S. 508 (1973), and other cases, which held that a state may not use a conclusive presumption that is not universally true when a reasonable alternative to the presumption is readily available. Furthermore, certiorari should be granted in this case because the exclusion here challenged lacks the "fair and substantial relation" to a state interest as required for a classification by, *e.g., Reed v. Reed,* 404 U. S. 71 (1971), and penalizes interstate travel by practicing attorneys like petitioner, contrary to this Court's decisions in *Sosna v. Iowa,* 419 U. S. 393 (1975); *Memorial Hospital v. Maricopa County,* 415 U. S. 250 (1974); *Dunn v. Blumstein,* 405 U. S. 330 (1972); and *Shapiro v. Thompson,* 394 U. S. 618 (1969), without any compelling state interest to justify such a penalty.

Petitioner's request for relief is limited, and eminently reasonable: he asks only that, now having practiced law for over nine years, he be given an opportunity to demonstrate that he is reasonably proficient in the practice of that profession.* He does not challenge the authority of the State

* This case is also of substantial importance because it presents questions related to the current national trend for recognition of professional licensing based on national examinations. Such national exams are already in extensive use in the medical, dental, accounting, and architectural professions, and the use of the Multi-State Bar Examination (MBE) prepared by the National Conference of Bar Examiners is spreading rapidly. Forty-three of 51 American jurisdictions now use the MBE, and 10 of these will accept recent MBE scores from a bar examination in another jurisdiction. National Bar Examination Digest, 1978 edition, p. 12. A past president of the American Bar Association has strongly attacked the lack of comity for professional licensing. See Chesterfield Smith, "Time for a National Practice of Law Act," 64 ABA JOURNAL 557 (1978).

of South Carolina to evaluate his professional proficiency now, and is prepared to undertake all reasonable tests of proficiency required, or to be required, including the state bar examination. He does challenge the authority of the state to prevent him from even taking appropriate tests of proficiency simply because the law school he attended a decade ago, in Atlanta, Georgia, did not have on its premises library facilities that satisfied the American Bar Association, or had similar defects not relevant to his current proficiency.

It is now clear that a licensed attorney, like a law graduate, has a protected interest in continuing his practice. As stated in *Baird v. Arizona,* 401 U. S. 1, 8 (1971), "The practice of law is not a matter of grace, but of right for one who is qualified by his learning and moral character." * See also *Willner v. Committee on Character & Fitness,* 373 U. S. 96, 102 (1963). The Constitution squarely protects an attorney in the practice of his profession: "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners,* 353 U. S. 232, 238-39 (1957). The right to practice law has been more recently characterized as being " 'of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.' " *In re Griffiths,* 413 U. S. 717, 720 (1973), quoting *Truax v. Raich,* 239 U. S. 33, 35 (1915). Therefore, whatever the na-

* Cf. *Konigsberg v. State Bar of California,* 353 U. S. 252, 257-58 (1975): preventing petitioner "from earning a living by practicing law . . . . has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer." The consequences are much greater for the man who, like petitioner, has been earning his living in that profession for years.

ture of the petitioner's interest in practicing his profession, his continuing to practice is clearly an "important individual interest with constitutional implications." *Sosna v. Iowa*, 419 U. S. 393, 420 (1975) (Marshall, J., dissenting). As the following discussion will demonstrate, the State's requirement that an attorney with eight years in active practice in another jurisdiction graduate from a law school approved by the American Bar Association before he can even take the bar examination in South Carolina violates both the Due Process Clause and the Equal Protection Clause.

I

South Carolina's conclusive presumption that a practicing lawyer who has not graduated from a law school approved by the American Bar Association is not qualified to practice law is not universally accurate, and proficiency may readily be ascertained by examination; therefore, the presumption violates due process of law.

The courts below recognized that the challenged rule of court "creates an irrebuttable [*sic*] presumption that applicants to the South Carolina bar, who are not graduates of ABA approved law schools, are unqualified to practice law in this State." 4a. This conclusive presumption cannot be distinguished from the presumptions condemned by this Court in other recent cases: the presumption "is not . . . universally true in fact and . . . the State has reasonable alternative means of making the crucial determination." *Vlandis v. Kline, supra*, 412 U. S. at 452. *See also United States Department of Agriculture v. Murry, supra*, 413 U. S. at 517 n. 2 (Stewart, J., concurring).

As this Court has noted in *Griggs v. Duke Power Co.*, 401 U. S. 424, 433 (1971), "History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment

in terms of certificates, diplomas, or degrees." * That statement is equally true of lawyers who do not have diplomas from the proper law schools.**

The absurdity of the state court rule is drawn sharply into focus by the qualifications of the petitioner. In addition to the State and Federal Courts of Georgia, petitioner is admitted to practice in the United States District Court for the District of South Carolina, the United States Courts of Appeals for the Fourth and Fifth Circuits, and to the bar of this Court. Yet, even if he practiced for thirty or forty years and won thirty or forty cases in this Court, he could never take the bar examination in the State of South Carolina to demonstrate his proficiency to practice law in South Carolina.***

The requirement of A.B.A. approval of a candidate's law school has a tenuous connection, at best, with the candidate's own training. From this record, for example, it appears that the lack of A.B.A. approval was principally based on the lack of a completely satisfactory law library, although the law school was located in Atlanta, Georgia, near the library facilities of the approved law school at Emory University and other law libraries. Other requirements for A.B.A. approval may have no relation to the individual candidate. For example, if the school admits any persons who have less than three years of college educa-

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* Cf. *Berger v. Board of Psychologist Examiners*, 172 U. S. App. D. C. 396, 521 F. 2d 1056, 1061 n. 8 (1975), which noted that the ordinance there under attack would have precluded Erik Erikson, author of *Childhood and Society*, and *Gandhi's Truth*, who is "perhaps the most eminent psychologist of our time," from taking an examination to become a practicing psychologist in the District of Columbia because Erikson did not have a graduate degree in psychology.

** As the courts below recognized, the South Carolina Supreme Court would not let the Chief Justice of the United States even take the examination for admission to the bar in South Carolina. 4a.

*** The change in the basis for evaluating petitioner's proficiency, after years of active practice, distinguishes this case from lower court decisions, such as *Lombardi v. Tauro*, 470 F. 2d 798 (1st Cir. 1972), which held the requirement of a diploma from an ABA approved law school to be reasonable. Therefore, the reasonableness of such a requirement for a graduate not yet admitted to practice is not presented here.

tion, it can never be approved. Approval of Law Schools: American Bar Association Standards and Rules of Procedure (1977), p. 14. Therefore, if petitioner, who has a baccalaureate degree from an accredited four-year college, attended such a school, he could never take the South Carolina bar examination, even though the school's lack of approval was wholly unrelated to petitioner's individual qualifications.

Mr. Justice Frankfurter, in *Schware v. Board of Bar Examiners, supra,* recognized that the bar examiners there had created an irrebuttable presumption that because Schware had been a Communist until 1940, fifteen years before he applied for admission to the bar, Schware was "a person of questionable character." 353 U. S. at 251. Petitioner submits that his proficiency in law when he graduated from a non-approved law school has no more to do with his proficiency after eight years of active legal practice * than Schware's Communist activities years earlier had to do with his moral character when he finished law school. This Court has frequently recognized that significant changes occur over a period of time, and such changes have been one of the most persuasive bases for striking down conclusive presumptions. See *United States Department of Agriculture v. Murry, supra* (claim of dependency for preceding taxable year); *Vlandis v. Kline, supra* (change in residency after application for college); *Dunn v. Blumstein, supra* (change in residency); *Carrington v. Rash,* 380 U. S. 89 (1965) (change in residency by member of the military).

This Court's irrebuttable presumption cases hold that, when it is demonstrated that a presumption is not universally true, and that there is a reasonable alternative procedure available to the state, * the conclusiveness of the presumption violates the Due Process Clause. A reasonable alternative is patently available—at least 31, and perhaps as many as 41 of the other American jurisdictions would allow petitioner to qualify for admission to the bar based upon his practical experience. Ten of these states ** would allow petitioner to take their bar examinations, and the others, *** would admit him without any examination, based on his years of practice (most jurisdictions require no more than 5 years).

Indeed, the courts below joined the overwhelming majority of jurisdictions in recognizing that the rule may exclude competent attorneys from practicing law. 5a. How-

* As the District Judge recognized, petitioner's experience included practice in one of the largest firms in the South. Transcript of Hearing, July 6, 1977, p. 17. That firm, Hansell, Post, Brandon & Dorsey, is rated "a" in quality by Martindale-Hubbell Law Directory (106 ed. 1974), Volume I, p. 1307.

* The courts below erroneously interpreted this Court's cases on conclusive presumptions as examining alternative procedures only when a "fundamental right" or "suspect classification" is involved. In fact, as the *Murry* case demonstrates, alternatives are probed even when the rights are *not* "fundamental"; see *San Antonio School District v. Rodriguez,* 411 U. S. 1, 32-33 (1973). This factor distinguishes the voiding of conclusive presumptions, which is of a procedural nature, see *Vlandis v. Kline, supra,* 412 U. S. at 455 (Marshall, J., concurring), from this Court's decisions invoking strict scrutiny of "suspect classifications" or in protection of "fundamental right." When strict scrutiny is invoked, the state must show it has chosen the narrowest alternative and has regulated with great precision; to sustain a conclusive presumption, the state need only show why alternatives that allow consideration of individual cases are not reasonable under the circumstances.

** Arizona and Hawaii allow attorneys with five years practice to take their regular bar exams regardless of formal legal training. 1976 Review of Legal Education, pp. 54, 56. The following states have a special attorneys' examination for all practicing attorneys with five years (or sometimes less) of practice: Alaska, California, Delaware, Idaho, Maine, Maryland, New Mexico, and Oregon. National Bar Examination Digest, 1978 edition, *passim.*

*** The following 21 jurisdictions would admit petitioner by comity: Arkansas, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New York, North Dakota, Ohio, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming. Petitioner's eligibility for the following states is not clear: Mississippi, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Washington, West Virginia, and Virginia (several require reciprocity, but may allow examination). It appears that only seven states besides South Carolina would definitely permanently preclude petitioner from admission because of the "deficiency" in his formal training: Alabama, Florida, Kansas, Kentucky, Louisiana, Nevada, and New Hampshire. (In New Jersey, petitioner could be admitted by comity with a score of 145 on the Multi-State Bar Exam.) National Bar Examination Digest, 1978 edition, *passim.*

ever, the courts sustained the rule simply because actual practice of law "does not in all cases replace the value of a formal legal education." [illegible]. This is an application of a sweeping rule, not universally true, that replaces the evaluation of individual cases. The State may not forego the evaluation of individual cases unless it shows that neither the bar examination nor any other evaluative criteria are reasonable alternatives for evaluating the competence of attorneys who have practiced in other states for years.

In addition, the concerns expressed in the district court's opinion, 5a, are hardly relevant to an active practitioner. If these are in fact the concerns of the state court, a reasonable alternative might be special requirements for recent completion of continuing legal education, or special requirements for types of practice experience for graduates of non-approved law schools. For the active practitioner, however, a degree from one of the already crowded A.B.A. approved law schools is not a requirement that can be met by "reasonable study or application." *Dent v. West Virginia*, 129 U. S. 114, 122 (1889).

II

The approved law school Rule denies Petitioner the Equal Protection of the Laws.

The state court rule prohibiting practicing attorneys from even taking the South Carolina bar examination unless they have graduated from a law school approved by the American Bar Association also violates equal protection of the laws. It neither bears a "fair and substantial relation" to any legitimate state interest, nor is the rule founded on any compelling state interest to justify the penalty of permanent and total exclusion from the legal profession that South Carolina would impose on petitioner and other similarly trained practicing attorneys who desire to migrate to South Carolina.

A. The rule bears no "fair and substantial relation" to a state interest.

As Mr. Justice White noted in his concurring opinion in *Vlandis v. Kline, supra*, 412 U. S. at 458-59, this Court has in recent years been applying a flexible standard for equal protection analysis, rather than a rigid dichotomy in which there is virtually no scrutiny of a classification unless it is based on a "suspect" criterion or affects a "fundamental" right, and in which there is strict scrutiny invalidating virtually every challenged classification if it is "suspect" or affects a "fundamental" right. The discussion above at pp. 7-8 makes clear that, whether or not this Court chooses to characterize the equal right to practice a profession* as a "fundamental" right, the right is clearly an "important individual interest[] with constitutional implications," *Sosna v. Iowa*, 419 U. S. 393, 420 (1975) (Marshall, J., dissenting). When such interests are at stake, this Court has generally required that the state demonstrate that a "fair and substantial relation" exists between the requirement and a legitimate state interest.** *Reed v. Reed*, 404 U. S. 71 (1971); *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972).

By any fair understanding of these terms, there cannot be a "fair and substantial relation" between the accreditation of the law school a student attends and his attaining, after eight years of active legal practice, the

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* Cf. the equal right to vote, which exists and is subject to strict scrutiny, although no "right to vote" is independently recognized. *San Antonio School District v. Rodriguez*, 411 U. S. 1, 34 n. 74, 35 n. 78 (1973).

** The right to enter a licensed profession such as the practice of law is not subject to any of the considerations that normally result in minimal judicial scrutiny. It does not involve a scheme of economic regulation or a welfare scheme distributing scarce resources. *Dandridge v. Williams*, 397 U. S. 471 (1970). Nor is it a matter, like police employment, that is "'firmly within a State's constitutional prerogatives.'" Cf. *Foley v. Connelie*, 46 U. S. L. W. 4237, 4239 (1978), and *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 312-13 (1976), with *In re Griffiths*, 413 U. S. 717 (1973).

minimum proficiency sought to be ascertained by bar examiners.** As noted above, p. 9-10, the factors that prevent a law school from gaining approval (such as pre-law training of the students admitted) may be totally irrelevant to the individual graduate. But even if a graduate suffers from a deficiency *when he graduates* that is related to the law school's nonaccreditation, there is no rational basis for inferring that the lawyer who has practiced successfully for eight years has not overcome any training deficiencies that would not be identified by a bar exam. As this Court held in *Schware, supra,* 353 U. S. at 239:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

For a practitioner with eight years experience, who is required to pass a bar examination to demonstrate his present proficiency, there can be no rational connection between his early legal training and his present proficiency to practice law. Therefore, the judgment approving the South Carolina rule conflicts with this Court's decision in *Schware.*

The absence of a rational connection between early legal training and the legal proficiency of practicing attorneys is emphasized by the fact that South Carolina is one of only eight American jurisdictions* that will never allow a practicing attorney to be admitted unless he has graduated from a law school approved by the A.B.A. All other jurisdictions will, under certain circumstances, allow prac-

** As noted in *Richardson v. McFadden,* 540 F. 2d 744, 750 (4th Cir. 1976), opinion *en banc,* 563 F. 2d 1130 (4th Cir. 1977), cert. den., 46 U. S. L. W. 3649 (4th Cir. 1978), the bar examiners in South Carolina seek only to establish that an applicant for admission has "minimal competency" to practice law. Cf. *Tyler v. Vickery,* 517 F. 2d 1089, 1101, reh. den., 521 F. 2d 815 (5th Cir. 1975), cert. den., 426 U. S. 940 (1976).

* Alabama, Florida, Kansas, Kentucky, Louisiana, Nevada, New Hampshire, and South Carolina.

ticing lawyers at least a chance to prove their proficiency on a bar examination.

B. The Rule imposes a penalty on interstate travel by permanently excluding a practicing attorney from Georgia from ever qualifying to practice in South Carolina, but has no compelling justification.

The courts below properly assumed that the challenged Rule could not withstand strict scrutiny. 8a. Therefore, if the Rule imposes a penalty on the right to travel, or otherwise invokes strict scrutiny, the Rule violates equal protection of the laws. Under the principles of this Court's prior decisions, it is clear that the Rule does impose such a penalty by permanently excluding petitioner from his profession if he migrates to his home state, South Carolina.

This Court has clearly held that governmental penalties that burden the right to travel are subject to strict scrutiny. *Shapiro v. Thompson, supra; Dunn v. Blumstein, supra; Memorial Hospital v. Maricopa County, supra.* More recently, this Court has emphasized that a penalty is distinguished by *excluding* persons from a crucial benefit without a countervailing justification. *Sosna v. Iowa, supra,* 419 U. S. at 406; cf. *ibid.* at 421-22 (Marshall, J., dissenting). Unlike the plaintiff in *Sosna,* petitioner is in fact "irretrievably foreclosed" from obtaining not only a part, but *any* part of what he seeks—the right to practice law in South Carolina. Since the exclusion is permanent, it is more burdensome, more of a penalty, than the temporary disqualifications in *Shapiro* (welfare aid); *Dunn* (voting); and *Maricopa County* (nonemergency medical assistance). The decision below is flatly inconsistent with the decision in *Dunn,* which emphasized that the denial of one right (voting) was a substantial burden on the right to travel. *Supra,* 405 U. S. at 339-42. The courts below properly recognized that the rule in issue discouraged travel by precluding

petitioner's practice of law, but erroneously concluded that such a penalty was constitutional, simply because the rule did not, on its face, specify that it applied to practicing attorneys in other states. Id. However, the fact that the rule does not state on its face that it precludes cerain practicing attorneys from travelling to South Carolina to reside and practice law cannot be relevant where the courts found that the rule unambiguously and conclusively has the effect of discouraging travel.

This Court has also recognized, in recent years, the importance of complete exclusion from the exercise of a beneficial right in invoking strict scrutiny. Most notably in *Rosario v. Rockefeller,* 410 U. S. 752, 757 (1973), this Court emphasized that New York's party registration requirements for primary elections, unlike laws previously invalidated, did not totally deny the electoral franchise to a particular class of residents, who had no way to make themselves eligible to vote. The exclusionary laws were invalidated, whereas the party registration provisions, which only required an early choice of party, were sustained. See *Carrington v. Rash, supra; Kramer v. Union School District,* 395 U. S. 621 (1969); *Cipriano v. City of Houma,* 395 U. S. 701 (1969); *City of Phoenix v. Kolodziejski,* 399 U. S. 204 (1970); *Dunn v. Blumstein, supra.* Since the challenged rule effects a complete and permanent exclusion from the practice of law by an active practitioner, it should be subject to the same strict scrutiny applied to those classifications that completely excluded voters from a given election.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-2256

MILTON M. MOORE, JR., APPELLANT,

versus

THE SUPREME COURT OF SOUTH CAROLINA; CHIEF JUSTICE J. WOODROW LEWIS, ASSOCIATE JUSTICE C. BRUCE LITTLEJOHN, ASSOCIATE JUSTICE JULIUS B. NESS, ASSOCIATE JUSTICE WILLIAM L. RHODES, JR., AND ASSOCIATE JUSTICE GEORGE T. GREGORY, JR., AS JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA, AND FRANCES H. SMITH, AS CLERK OF THE SUPREME COURT OF SOUTH CAROLINA AND IN HER OFFICIAL CAPACITY AS SECRETARY TO THE STATE BOARD OF LAW EXAMINERS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA.
ROBERT F. CHAPMAN, DISTRICT JUDGE.

Submitted March 10, 1978 Decided May 1, 1978

BEFORE BOREMAN, SENIOR CIRCUIT JUDGE, WINTER AND BUTZNER, CIRCUIT JUDGES.

Per Curiam:

Milton M. Moore, Jr., a Georgia attorney who wishes to move his practice to South Carolina, brought this suit to compel the South Carolina Supreme Court and the State

Board of Law Examiners to accept his application to take the state bar examination. Defendants had refused plaintiff's petition because of non-compliance with the state requirement that an applicant be a graduate of "a law school approved by the Council of Legal Education of the American Bar Association. . . ." Rule 5(4), Rules for the Examination and Admission of Persons to Practice Law in South Carolina. Plaintiff admits that he is not a graduate of an ABA-approved law school; nonetheless, he contends that he is entitled to relief because Rule 5(4) denies him equal protection of the law in violation of the fourteenth amendment.

Plaintiff advances two equal-protection arguments. First, he contends that Rule 5(4), by preventing him from practicing law in South Carolina, impermissibly burdens his right to travel. *Shapiro v. Thompson,* 394 U. S. 618 (1969). Second, he asserts that Rule 5(4) establishes an irrebuttable presumption that one who graduates from a law school not approved by the ABA is not qualified to practice law and that the use of this presumption to disqualify an entire class of applicants is impermissible in light of such cases as *Cleveland Board of Education v. LaFleur,* 414 U. S. 632 (1974), and *Vlandis v. Kline,* 414 U. S. 441 (1973). For the reasons assigned by the district court in its comprehensive opinion, we conclude that neither theory entitles plaintiff to the relief sought. *Moore v. The Supreme Court of South Carolina,* D. S. C., Civil No. 77-0494, July 14, 1977 (unpublished).

Accordingly, the decision of the district court granting summary judgment to the defendants is

AFFIRMED.

APPENDIX B

FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

MILTON M. MOORE, JR., PLAINTIFF,

versus

THE SUPREME COURT OF SOUTH CAROLINA; CHIEF JUSTICE J. WOODROW LEWIS, ASSOCIATE JUSTICE C. BRUCE LITTLEJOHN, ASSOCIATE JUSTICE JULIUS B. NESS, ASSOCIATE JUSTICE WILLIAM L. RHODES, JR., AND ASSOCIATE JUSTICE GEORGE T. GREGORY, JR., AS JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA, AND FRANCES H. SMITH, AS CLERK OF THE SUPREME COURT OF SOUTH CAROLINA AND IN HER OFFICIAL CAPACITY AS SECRETARY TO THE STATE BOARD OF LAW EXAMINERS, DEFENDANTS.

Civil Action No. 77-494

ORDER

This matter is before the Court on cross motions for summary judgment. The material facts are undisputed. Plaintiff is a Georgia attorney who desires to practice law in South Carolina; however, he is unable to move his practice to this state because the South Carolina Supreme Court has refused his application to take this state's bar exam. This refusal was based on the "Rules for the Examination and Admission of Persons to Practice Law in South Carolina" which were promulgated by the South Carolina Supreme Court. Rule 5(4) provides:

> No person shall be admitted to the practice of law in South Carolina unless he . . . (4) is a graduate either of the Law School of the University of South Carolina, a law school approved by the Council of Legal Education of the American Bar Association or such other Law School as may be approved by the Supreme Court.

Unfortunately for the plaintiff he graduated from a law

school in Georgia which is not approved by the ABA and, therefore, is ineligible to practice law in South Carolina.

Plaintiff filed the instant suit seeking an injunction against the enforcement of Rule 5(4) on the ground that the rule is unconstitutional as depriving him of his rights to "equal protection" and "due process". With respect to his equal protection claim plaintiff first alleges that the rule has no rational basis as applied to him. He concedes that the rule as applied to recent non-lawyer graduates of non-accredited law schools has a rational basis. This concession is made in view of various cases which have specifically held that rules, such as the one in this case, have a rational basis because they are reasonably related to competence to practice law. *Lombardi v. Tauro,* 470 F. (2d) 798 (1st Cir. 1972); *Hackin v. Lockwood,* 361 F. (2d) 499 (9th Cir. 1966); *Ostroff v. New Jersey Supreme Court,* 415 F. Supp. 326 (D. N. J. 1976); *Potter v. New Jersey Supreme Court,* 403 F. Supp. 1036 (D. N. J. 1975). Plaintiff argues, however, that these cases are distinguishable because the plaintiff in each of those cases was not a licensed attorney in some state. He sees the wisdom of the rule as applied to non-lawyer applicants for admission to the Bar but feels that the rule is too strict when applied to a practicing attorney in another state who desires to become a member of the South Carolina Bar. In this connection plaintiff repeatedly points out that many distinguished members of the federal judiciary including the Chief Justice of the United States Supreme Court would be ineligible to practice law in South Carolina because they did not attend ABA approved law schools.

This Court is not persuaded by the distinction which plaintiff seeks to draw. By arguing that the rule is reasonable as applied to some but unreasonable as applied to others plaintiff is asking this Court to rewrite the rule for the South Carolina Supreme Court. According to his argument the rule should read that all persons desiring to practice law in South Carolina must, in addition to taking the bar exam, either graduate from an ABA approved law school **or** be a member of the bar of some other state. Although this Court questions the fairness of Rule 5(4) in

light of the fact that a competent attorney may be prevented from practicing in this state, the hardship imposed upon plaintiff by the strict operation of the rule is not a deprivation which reaches constitutional dimensions.

The states have both a duty and a right to regulate the practice of professions within their borders and federal courts should not interfere with such internal regulation unless the regulations invidiously discriminate against a certain class of citizens or otherwise are in no way reasonably related to ensuring the character and competence of their professionals. The rule in this case was promulgated as one of two basic means of evaluating the competence of those who apply for membership in the South Carolina Bar. One way of testing an applicant's knowledge of the law is to require him to take the South Carolina bar exam. This test has a great deal of value; however, the fact that one passes the bar exam does not necessarily mean that he is qualified to practice law. A person may "read law" or take correspondence courses which may prepare him for the bar exam but which may not prepare him for the practice of law.

The other means of ensuring the qualifications of candidates for admission to the bar is the requirement that they graduate from an ABA approved law school. By imposing this requirement the Supreme Court was clearly seeking assurance that the applicants received some kind of formal legal education with a broader scope than mere preparation for the bar exam. The Supreme Court obviously saw the value of lectures by legal scholars, classroom discussions, the teaching of research skills, and student oral arguments—all facets of a legal education which are not tested by the bar exam.

This Court will not set aside the law school requirement with respect to nonresident attorneys and merely replace it with another bar exam. The fact that a person who has not graduated from an ABA law school has passed the bar of a sister state and has actually practiced law in that state does not in all cases replace the value of a formal legal education. The Supreme Court has as much right to impose the law school requirement on practicing attorneys

as it does to impose it on those who are not attorneys. Rule 5(4), despite the harshness of its application to the plaintiff, has a rational basis and, therefore, is constitutional under the traditional equal protection test.

Plaintiff apparently saw the weakness of his position under the traditional "rational basis" test and has argued that a newer and stricter "compelling state interest" test applies. In cases where this test is applied, any classification made by the state is strictly scrutinized and is deemed constitutionally invalid unless the state can show that the classification promotes a compelling state interest. Two types of classifications are subjected to this test. A classification which involves race, *Loving v. Virginia*, 388 U. S. 1 (1967); *McLaughlin v. Florida*, 379 U. S. 184 (1964), or alienage, *In Re Griffiths*, 413 U. S. 717 (1973); *Graham v. Richardson*, 403 U. S. 365 (1971), is inherently "suspect" and is invalid unless designed to promote a compelling state interest. No suspect classification is involved in the instant case. The classification only distinguishes between those who graduated from ABA approved law schools and those who did not. The other type of classification, which is strictly scrutinized under the compelling state interest test, is one which infringes upon a fundamental right. The main thrust of plaintiff's case is based upon his argument that the classification infringes upon his fundamental right to travel. Plaintiff argues that Rule 5(4) infringes upon his right to travel to South Carolina because he is not allowed to pursue his chosen vocation in this state.

The United States Supreme Court has held that the equal protection clause of the 14th amendment may be violated by state statutes which unduly restrict the fundamental right of interstate travel. Each case decided on this point dealt with a durational residency requirement which operated to prevent new residents from voting, *Dunn v. Blumstein*, 405 U. S. 330 (1972), or from receiving welfare benefits, *Shapiro v. Thompson*, 394 U. S. 618 (1969), or from receiving free nonemergency medical treatment, *Memorial Hospital v. Maricopa County*, 415 U. S. 250 (1974). These cases held that classifications which "penalize" the right to travel are constitutionally invalid in the absence

of a compelling state interest. Although plaintiff seeks to rely on these cases because Rule 5(4) penalizes his movement to South Carolina and it prevents him from practicing law, this reliance is misplaced. There is a crucial factual distinction between this case and the *Shapiro* line of cases which centers on the nature of the classification. A durational residency requirement on its face creates a classification between long term residents and recent migrants. Accordingly, such a classification directly involves the right to travel. The ABA law school requirement, on the other hand, does not draw a distinction between residents and nonresidents or between long term residents and recent migrants. Rule 5(4) applies to residents and nonresidents alike. The classification distinguishes only between those who have graduated from ABA approved law schools and those who have not. In light of this distinction, the *Shapiro* test, which appears to require little more than a chilling effect on the right to travel, is inapplicable. Where, as in the instant case, the classification is totally unrelated to interstate travel, it must not be evaluated under the compelling state interest test unless it effectively prevents travel and not merely discourages it. Rule 5(4) clearly discourages plaintiff from traveling to South Carolina for the purpose of establishing a residence since it prevents him from practicing law. However, it does not operate as an absolute bar to plaintiff's moving to this state. He is free to move to South Carolina if he wishes and engage in business. However, he cannot practice law unless he obtains a degree from an ABA approved law school.

This case is one of first impression with respect to whether a state rule violates the fundamental right to travel when it conditions the taking of the bar exam on graduation from an ABA approved law school. Although no case is directly on point, some courts have addressed the right to travel issue in similar contexts. In *Hawkins v. Moss*, 503 F. (2d) 1171 (4th Cir. 1974), the plaintiff, a New Jersey lawyer, sought admission to the South Carolina Bar without taking the bar exam. The rule in that time permitted residents of South Carolina who had practiced law in other states to become members of the South Carolina

Bar "without examination". However, the rule had a proviso which stated, "Attorneys from states not extending reciprocity on substantially equal terms to attorneys licensed in this State shall not be admitted under this rule." Since New Jersey did not grant reciprocity to South Carolina lawyers, the Supreme Court would not admit plaintiff to practice until he passed the bar exam. As part of his argument that the proviso violated the equal protection clause, plaintiff claimed that it infringed on his fundamental right to travel. The Court, however, rejected this claim. The right to travel issue was extensively discussed by the Court in language too lengthy to be quoted here; however, some excerpts are particularly pertinent. The Court stated:

> The right of federal citizenship as reflected in the "right to travel" and as protected by [the "privileges and immunities" provision] is not to be construed to mean that a citizen carries with him from state to state an absolute right of comity to practice, not a "common occupation", but a profession which is properly subject to state regulation . . . . *Id.* at 1178-79.
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> But here there is no condition on the appellant's actual right to travel; the only condition relates to his right to practice a constitutionally regulated profession within the state. *Id.* at 1179.

The constitutionality of a reciprocity rule, as it affected the right to travel, was also discussed in *Shenfield v. Prather,* 387 F. Supp. 676 (N. D. Miss. 1974) (three-judge court). The Mississippi rule required that all applicants take a bar exam except those with law degrees from the University of Mississippi or those who had practiced law for five years and were licensed in a state which granted reciprocity to Mississippi lawyers. The Court held in that case "that plaintiff's fundamental right to travel [was] not infringed by the bar admission plan, and that strict judicial scrutiny is thus inappropriate." *Id.* at 683. Montana's "diploma privilege" was upheld against constitutional attack in *Huffman v. Montana Supreme Court,* 372 F. Supp. 1175 (D. Mont. 1974) (three-judge court). Under this privilege law graduates of the University of Montana were

exempted from the requirement imposed on all other applicants to the bar that they pass the bar exam. With respect to the right to travel aspect of plaintiff's equal protection argument the Court distinguished the *Shapiro* line of cases by finding "a very real and substantial distinction between a diploma privilege and a residence requirement." *Id.* at 1182. In holding that this privilege did not infringe on the right to travel the Court stated:

> The diploma privilege does not intend such a "direct impingement" upon interstate travel. Nor is the purpose of the diploma privilege to inhibit migration to Montana. Rather, it is designed to ensure competent and morally fit attorneys. Furthermore, the diploma privilege is not a residence requirement.
>
> Certainly there exist numerous statutes in our several states which may affect citizens in their decisions of whether to travel to or reside in those states. For example, a state may impose a sales tax upon specified commodities in trade. A state may also impose speed limits upon drivers of motor vehicles upon that state's public highways. While a sales tax or a speed limit may influence some citizens in their decisions of whether to travel to or reside in our states, those statutes do not constitute a direct impingement upon the fundamental personal right of interstate travel.
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> Similarly, the diploma privilege does not constitute a direct impingement upon the fundamental right of interstate travel. As evidenced by the uncontested statement of facts, the "plaintiff knew that he would be eligible for admission to the Montana Bar on motion if he graduated from the University of Montana Law School prior to the time he entered the University of Chicago Law School." Yet, the diploma privilege did not in any way impinge upon the plaintiff's right to travel to Illinois to attend school. Nor did the diploma privilege in any way impinge upon the plaintiff's residency in the State of Montana. In short, the diploma privilege, as enacted in Section 93-2002, R. C. M. 1947, like numerous other state statutes, does not di-

rectly impinge upon the fundamental right of interstate travel. *Id.* at 1182.

As with the diploma privilege in *Huffman*, South Carolina's ABA law school requirement does not infringe the right to travel. Accordingly, since no fundamental right is violated by Rule 5(4), it is not required to be supported by a compelling state interest.

One other constitutional objection has been raised by the plaintiff in this case—that of due process. He claims that Rule 5(4) imposes upon him an "irrebutable presumption" that he is unqualified to practice law since he is not permitted to prove his competence by taking the bar exam. This argument is made in light of various Supreme Court cases which have held that statutes which create irrebutable presumptions violate due process unless justified by a compelling state interest. See *Turner v. Dept. of Employment Security*, 423 U. S. 44 (1975) (Utah law which made pregnant women ineligible for unemployment benefits for a period from 12 weeks before expected childbirth until six weeks thereafter created an irrebutable presumption which violated due process); *Cleveland Board of Education v. LaFleur*, 414 U. S. 632 (1974) (Ohio rule which required pregnant school teacher to take maternity leave five months before expected birth created unconstitutional irrebutable presumption); *Vlandis v. Kline*, 412 U. S. 441 (1973) (rule which presumed students who were nonresidents upon entering college to be nonresidents until they finished was unconstitutional); *United States Dept. of Agriculture v. Murray*, 413 U. S. 508 (1973) (provision of Food Stamp Act created unconstitutional irrebutable presumption by providing that households which include a member who had reached his eighteenth birthday and who was claimed as a dependent child for federal income tax purposes by a taxpayer who was not a member of an eligible household were ineligible to receive food stamps); *Stanley v. Illinois*, 405 U. S. 645 (1972) (Illinois law which did not afford fitness hearing to unwed father upon mother's death but automatically made the children wards of the state created an unconstitutional irrebutable presumption); *Bell v. Burson*, 402 U. S. 535 (1971) (Georgia law which required uninsured

motorists involved in an accident to post sufficient security to cover damages claimed by other victims of accident and which afforded the uninsured motorist no opportunity to show lack of fault or liability was unconstitutional).

Rule 5(4) clearly creates an irrebutable presumption that applicants to the South Carolina bar, who are not graduates of ABA approved law schools, are unqualified to practice law in this state. However, it is not clear that the use of this presumption per se invokes strict scrutiny analysis. Two recent Supreme Court cases have created uncertainty in this area by appearing to approve of certain kinds of irrebutable presumptions. In *Weinberger v. Salfi*, 422 U. S. 749 (1975), the Court upheld a provision of the Social Security Act which disallowed survivorship benefits to widows or step children married to or step children of the deceased for less than nine months prior to his death. Although this provision created an irrebutable presumption that the marriage was collusively entered into in order to receive benefits after the expected death of an ill wage earner, the Court refused to apply strict scrutiny analysis, distinguishing *LaFleur*, *Vlandis* and similar cases.

In *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307 (1975), the Court was confronted with a constitutional objection to a rule requiring mandatory retirement of policemen at age 50. It upheld the constitutionality of mandatory retirement rules under traditional equal protection analysis finding a rational basis for such rules. It also discussed the strict scrutiny test but found it inapplicable because no fundamental right or suspect class was involved. Unfortunately, despite the fact that mandatory retirement rules create irrebutable presumptions that the employee is unfit to work after a certain age, the Court did not discuss the due process test. One can only infer that irrebutable presumptions in mandatory retirement rules comport with due process from the Court's holding that such rules are constitutional.

In light of *Salfi* and *Murgia*, it appears that all irrebutable presumptions are not subjected to strict scrutiny. This viewpoint finds support in the concurring opinion in *Miller*

v. Carter, 547 F. (2d) 1314, 1319 (7th Cir. 1977), where it is stated:

> I fully recognize that, to say the least, this area of the law continues to evolve. On the one hand, decisions such as *Bell, Stanley, Vlandis, LaFleur* and *Turner* reflect a disdain for irrebutable presumptions of ineligibility. On the other, the dissenting opinions in each of those cases and the Court's decision in *Salfi* suggest the unworkability of a rule forbidding all conclusive classifications. And as evidenced by the *Murgia* decisions, the area involving perhaps the clearest use of conclusive presumptions — mandatory retirement — continues to be tested solely on traditional equal protection grounds. *Id.* at 1329.

In light of the uncertainty in this area, district courts will have to determine whether to subject a particular irrebutable presumption to strict scrutiny on a case-by-case basis until the Supreme Court establishes some definitive guidelines. With respect to the case at bar, this Court is unwilling to extend the strict scrutiny test to a state rule which imposes certain minimum qualifications for the practice of a profession. If this test were so extended the states would lose all control over the licensing of professional occupations and the federal courts would become quasi-administrative licensing boards. A state could not even require a person, who desired to practice medicine, to have a medical school degree, because such a requirement would create an irrebutable presumption that a person who did not have such a degree was unqualified. Chief Justice Burger recognized this precise problem in his dissent in *Vlandis* when he stated:

> But literally thousands of state statutes create classifications permanent in duration which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State

> provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred "permanently and irrebutably" from pursuing his calling, without ever having an opportunity to prove his personal skills.

Vlandis v. Kline, 412 U. S. 441, 462 (1973) (Burger, C. J., dissenting opinion). Although no case has precisely held that irrebutable presumptions established by educational requirements for professionals are exempted from strict scrutiny,[1] this Court has found one case which contains language in dicta to this effect. In *Berger v. Board of Psychologist Examiners,* 521 F. (2d) 1056 (D. C. Cir. 1975), the plaintiff was a psychologist who had practiced in the District of Columbia for 14 years. However, in 1971 Congress passed a law which required that all psychologists be licensed but which only permitted issuance of licenses to applicants with a specified educational background. Since plaintiff did not have the formal training required by the statute, he was refused a license and was consequently barred from continuing his practice. The Court declared the statute to be unconstitutional since it contained no "grandfather" clause which would permit plaintiff to demonstrate his competence. This holding was reached by applying the strict scrutiny rule of *Vlandis* and related cases because the educational requirements of the statute imposed on plaintiff an irrebutable presumption that he was unqualified to practice psychology. The Court specifically stated, however, that the strict scrutiny test was only applied because of the absence of an adequate grandfather clause. In so limiting its holding, the Court made the fol-

[1] Two three-judge district courts have held that ABA law school requirements such as established by South Carolina's Rule 5(4) do not violate due process because they do not create "irrebutable presumptions" but rather operate as "conditions precedent" to admission to the bar. *Ostroff v. New Jersey Supreme Court,* 415 F. Supp. 326 (D. N. J. 1976); *Potter v. New Jersey Supreme Court,* 403 F. Supp. 1036 (N. N. J. 1975). This Court believes, however, that Rule 5(4) does create an irrebutable presumption, but it is nonetheless constitutional.

lowing statement which relates to the facts of the instant case:

> Here the irrebutable presumption of professional incompetence absent a graduate degree is not invalid with respect to future psychologists, but only with respect to current practitioners who have no meaningful grandfather rights. . . . Certainly a graduate degree may be required of a practicing psychologist, just as it is required of doctors and lawyers. *Id.* at 1063.

The irrebutable presumption established by Rule 5(4) is not the type which can justifiably be subjected to strict scrutiny. Accordingly, the rule is constitutional under the due process clause without the necessity of requiring the state to prove a compelling state interest.

Rule 5(4) is clearly rationally related to South Carolina's interest in insuring the competence of those who apply for admission to its bar. Plaintiff's attempt to apply the stricter "compelling state interest" test cannot succeed. No fundamental right is directly infringed by the rules so as to require strict scrutiny under equal protection analysis and the irrebutable presumption created by the rule does not require strict scrutiny under due process analysis.

Accordingly, the defendants' motion for summary judgment is granted.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN,
United States District Judge.

July 14th, 1977,
Columbia, South Carolina.

TRUE COPY
Test:
MILLER C. FOSTER, JR.,
Clerk,

By: /s/ .....,
Deputy Clerk.